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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CASE. NO. 07 CV 2391  
(JAH POR)

GEORGIA-PACIFIC CONSUMER  
PRODUCTS LP, a Delaware limited  
partnership,

Plaintiff,

vs.

LEE'S GENERAL TOYS, INC., a California  
corporation, JOHN LEE, an individual;  
and DOES 1-10,

Defendants.

DEFENDANTS' OPPOSITION  
TO PLAINTIFF GEORGIA  
PACIFIC'S MOTION FOR  
PRELIMINARY INJUNCTION;  
DECLS. OF JOHN LEE;  
DECL. OF R. MARTINETTI  
DECL. OF A. JIMENEZ

Date: Feb. 28, 2008  
(Defs. brief due)

(Assigned to Hon.  
J. Houston)

DEFENDANTS Lee's General Toys, Inc. and John Lee respectfully  
submit their Opposition to Plaintiff's Motion for Preliminary  
Injunction.

Dated: February 26, 2008

KAZANJIAN & MARTINETTI  
RONALD MARTINETTI, ESQ.

By Ronald Martinetti  
Ronald Martinetti  
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

**A. OVERVIEW**

Plaintiff Georgia-Pacific Consumer Products claims that it holds four valid trademarks in bathroom tissues: This list includes three trademarks with the phrase ANGEL SOFT and one with the phrase ANGEL SOFT PS. (Memorandum in Support of Ex Parte Application for TRO, p. 4) ("Memorandum")

Plaintiff's ANGEL SOFT products are sold in retail outlets. However, Defendant does not sell to commercial outlets such as hotels that carry ANGEL SOFT PS products. (Suppl. Decl. of John Lee, par. 4) Moreover, Defendant's products are largely sold in the Latino and Spanish speaking Southern California market---a market in which ANGEL SOFT tissues are totally unknown (Decl. of Armando Jimenez, par. 4) Further, three of Defendant's five distributors largely sell to swap meets that are patronized by Latinos and where ANGEL SOFT has no presence or advertising. (Suppl. Decl. of John Lee, par. 6)

Moreover, Defendant has stopped importing, selling, and distributing Angelite products pending the outcome of this litigation and has informed its distributors in writing that it will not accept re-orders. (Suppl. Decl. of John Lee, par. 5)

**B. PLAINTIFF GEORGIA-PACIFIC MUST DEMONSTRATE "PROBABLE SUCCESS ON THE MERITS" BEFORE IT WILL BE GRANTED INJUNCTIVE RELIEF. SINCE GEORGIA-PACIFIC HAS NOT ESTABLISHED VALID TRADE DRESS OR TRADE MARK CLAIMS FOR ITS ANGEL SOFT TISSUE, THERE IS NO LIKELIHOOD OF CONFUSION TO SUPPORT ITS REQUEST FOR IMMEDIATE RELIEF.**

1. The Ninth Circuit has set forth the required showing for

injunctive relief in trademark cases in AMF Inc. v. Sleekcraft  
Boats and GoTo.com., Inc. v. Walt Disney Co.

Injunctive relief is a serious remedy since it may benefit or  
harm a party before there is an opportunity for full discovery.  
Therefore our courts have required a strong showing on the part  
of the party who seeks this provisional remedy. Plaintiff seeks  
to persuade the court that can demonstrate "probable success on  
the merits" and "the possibility of irreparable injury." In fact,  
once a party has shown probable success on the merits in its  
trademark claim, irreparable injury is presumed. See, GoTo.com. v  
Walt Disney Co., 202 F.3d. 1199, 1205 (9th Cir. 2000)

At the preliminary injunction stage, a party must show "a  
likelihood of confusion" to prevail under the Lanham Act.  
GoTo.com. v. Walt Disney Co., supra, 202 F.3d at p. 1205. In the  
Sleekcraft case, our circuit has set forth eight factors to guide  
the trial court in determining likelihood of confusion: 1) the  
similarity of the marks; 2) the relatedness of the two companies'  
services; 3) the marketing channel used; 4) the strength of the  
challenging mark; 5) the opposing party's intent in selecting its  
mark; 6) evidence of actual confusion; 7) the likelihood of  
expansion into other markets; 8) the degree of care likely to be  
exercised by purchases. GoTo.com, Inc. v. Walt Disney, supra, 202  
F.3d at p. 1205 (citing the Sleekcraft factors)

This test is a "pliant" one; "some factors are much more  
important than others." GoTo.com., Inc. v. Walt Disney Co.,  
supra, 202 F.3d. at p. 1205 (citing Brookfield Communication,  
Inc. v. West Coast Entertainment Corp., 174 F.3d 1036, 1054 (9th  
Cir. 1999)

1 However, "an important question" in fact, " a critical ques-  
2 tion in the likelihood of confusion analysis"--is "the similarity  
3 of the marks." GotTo.com, Inc. v. Walt Disney Co., supra, 202  
4 F.3d at p. 1205)

5 In the present case, Plaintiff Georgia-Pacific has not made  
6 the required showing that it possesses a valid trade dress mark  
7 or that it has a valid trademark in the four marks it lists in  
8 its moving papers (Memorandum, p. 4)

9 In fact, Plaintiff appears uncertain as to whether its four  
10 marks are "suggestive marks" or "arbitrary." (Memorandum, p. 12:  
11 "Whether the ANGEL SOFT Trademarks are classified as arbitrary or  
12 as suggestive marks, the ANGEL SOFT Trademarks are strong...");  
13 (Same uncertainty shown in Supplemental Brief in Support of  
14 Motion for Preliminary Injunction, p. 9) ("Supplemental Brief")

15 Since Plaintiff claims that the ANGEL SOFT mark was registered  
16 over sixty years ago, it would seem that Plaintiff would know for  
17 certain that the mark had been arbitrarily selected and was  
18 therefore entitled to complete protection--as are famous marks  
19 such as Dutch Boy paint or APPLE computers (Sir Isaac Newton  
20 notwithstanding). Adam L. Brookman, Trademark Law, Section  
21 2.02[A], p. 2-19 (2002 Supplement)

22 C. PLAINTIFF'S ORDINARY PACKAGING OF ITS ANGEL SOFT AND ANGEL  
23 SOFT PS PRODUCTS DOES NOT MERIT TRADE DRESS PROTECTION. MOREOVER  
24 DEFENDANT ANGELITE DOES NOT COMPETE IN THE SAME MARKET AS ANGEL  
25 SOFT PS AND PLAINTIFF HAS NOT DEMONSTRATED ANY PRESENCE IN THE  
26 CALIFORNIA LATINO OR SPANISH SPEAKING MARKET DEFENDANTS SELL TO  
27 1. Georgia-Pacific's ordinary ANGEL SOFT package is not enti-

28



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1 tied to trade dress protection.

2 a. Trade dress protection should be extended cautiously  
3 Plaintiff appears to claim trade dress protection for its  
4 ANGEL SOFT (as well as its ANGEL SOFT PS products). (Memorandum,  
5 pp. 5, 7, 16) However, Plaintiff does not cite any authority that  
6 would extend trade dress protection to its rather ordinary pack-  
7 aging of toilet tissue--a standard roll that resembles every  
8 other toilet paper on the market. (Exh. 1, Scott tissue photo-  
9 graph) (Exh. 2, photograph of CVS drugstore chain generic toilet  
10 tissue wrapping)

11 Trade dress refers to the overall look of a product--literally  
12 how it is "dressed up." As one District Court has noted, "Trade  
13 dress' refers to the appearance of the product and may include  
14 features such as size, shape, color, color combinations, texture,  
15 or graphics." Stx. Inc. v. Trik Stik, Inc., 708 F.Supp. 1551,  
16 1557 (N.D.Cal. 1988). However, one scholar has cautioned: "Not  
17 all trade dress is protectable. In fact, most trade dress is  
18 probably not protectable." (Emphasis in original.) Adam Brookman,  
19 Trademark Law, Section 6.01, p. 6-4 (2003 Supplement)

20 b. ANGEL SOFT's packaging is not distinctive nor has it ac-  
21 quired any special appeal in the California Spanish speaking  
22 market that Defendants sell to.

23 To prevail on a trade dress claim, a party must demonstrate  
24 that: (1) the trade dress is inherently distinctive or has ac-  
25 quired distinctiveness through secondary meaning; (2) there is a  
26 likelihood that the public will be confused by the infringing  
27 use; and (3) the trade dress is nonfunctional." Stephen W. Boney,  
28 Inc. v. Boney Services, Inc. 127 F.3d 821, 828 (9th Cir. 1997)

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1 ANGEL SOFT'S package consists of the wrapping of the standard  
2 white toilet paper rolls. (Memorandum, p. 3) The outer wrapping  
3 is clear--there is nothing striking or unusual in a package  
4 wrapped in a clear outer wrapping. Moreover, the blue and yellow  
5 colors are not unusual: at least one drugstore chain (CVS) uses  
6 the same yellow and blue combination on its toilet paper. (Exh. 2,  
7 CVS drugstore chain generic toilet tissue wrapping) Further,  
8 Scott tissue uses a blue background. (Exh. 1, Scott tissue photo-  
9 graph)

10 Defendant Angelite's pink wrapping stands in stark contrast to  
11 the blue and yellow of ANGEL SOFT. Moreover, plaintiff has  
12 submitted to the court a wide array of glossy advertisements in  
13 national English language journals (e.g. American Baby and Family  
14 Circle), but it has not produced any evidence demonstrating that  
15 a California shopper in the Latino or Spanish speaking market  
16 would confuse Angelite's attractive pink wrapping with a differ-  
17 ent product dressed in a dark blue and bright yellow. Therefore,  
18 in assessing any secondary meaning, the Court should disregard  
19 Plaintiff's ads and testimonials from its corporate executives as  
20 irrelevant.

21 C. Plaintiff has not demonstrated a non-functional purpose as  
22 to merit trade dress protection

23 Our circuit also requires that the trade dress be "nonfunc-  
24 tional." Stephen W. Boney, Inc. v. Boney Services, Inc., supra,  
25 127 F.3d at p. 828. This attribute has been described as "a mere  
26 arbitrary embellishment" that lends the product a distinctive  
27 flair. Vuitton et Fils S.A. v. J. Young Enterprises, Inc., 644  
28



1 F.2d 769, 773 (1981) What is the embellishment that Plaintiff  
2 claims deserves protection: a photograph of a baby set against a  
3 blue background? (Memorandum, p. 3) Even if this were somehow  
4 considered distinctive, Defendant's package has no such photo-  
5 graph and its soft pink cannot be confused with Plaintiff's  
6 bright blue and yellow.

7 Further, Plaintiff has not made any showing that its product  
8 is recognizable in the California Latino or Spanish speaking  
9 market, especially at the swap meets where Angelite is sold.  
10 (Suppl. Decl. of John Lee, par. 5) Vuitton et Fils S.A. v. J.  
11 Young Enterprises, Inc., supra, 644 F.2d at p. 773 (showing of  
12 secondary meaning required to show non-functionability).

13 Therefore, Plaintiff's ANGEL SOFT mark is not protectable.

14 d. ANGEL SOFT PS's drab industrial packaging is not entitled  
15 to trade dress protection

16 Plaintiff apparently also makes the claim that its ANGEL SOFT  
17 PS is entitled to trade dress protection. (Memorandum, pp. 3, 5,  
18 7, 17 at note 5) A photograph of this rather ordinary looking  
19 roll of toilet tissue is reproduced in Plaintiff's Ex Parte  
20 Application (at p. 3). The drab industrial packaging bears no  
21 resemblance to Defendant's pink and white wrapping.

22 Moreover, Defendant distributes its bathroom tissue largely in  
23 the California Spanish speaking and Latino market. Plaintiff  
24 sells to commercial outlets (such as Little Caesar Enterprises).  
25 (Memorandum, p. 4) Since Defendant does not compete in Plain-  
26 tiff's market, there is no likelihood of confusion.

27 In addition, Plaintiff has only been selling ANGEL SOFT PS  
28 since 2003. (Memorandum, p. 3) There is no showing that this

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1 wrapping is so well known by Little Caesar, or the rest of the  
2 industrial market, to justify trade dress protection. See, Vuit-  
3 ton et Fils S.A. v. J. Young Enterprises, Inc., supra, 644 F.2d  
4 at pp. 773, 776 (question of fact whether Louis Vuitton use of  
5 fleur-de-lis is functional and if so whether mark has acquired a  
6 secondary meaning)

7 D. PLAINTIFF'S ANGEL SOFT MARKS ARE PURELY DESCRIPTIVE TERMS AND  
8 SO ARE NOT ACCORDED STATUTORY PROTECTION. IN FACT, THE TRADEMARK  
9 OFFICE REFUSED TO APPROVE PLAINTIFF'S USE OF THE WORD "SOFT"

10 Plaintiff admits in its moving papers that the four trademarks  
11 in question "...were issued only if the word "soft" was dis-  
12 claimed from protection." (Memorandum, p. 13)

13 Plaintiff does not elaborate as to why the word "Soft" was  
14 rejected by the Trademark Office; presumably, the term "soft" was  
15 rejected as purely descriptive. However, the term Angel Soft is  
16 merely another way of describing the tissue as "soft as an  
17 angel," and our circuit has long held that "purely descriptive  
18 terms...are not so protected." Carter-Wallace, Inc. v. Procter &  
19 Gamble Co., 434 F.2d 794, 800 (9th Cir. 1970) (e.g., "shredded  
20 wheat") (citation omitted) In fact, the term "angel soft" has  
21 been used to describe a wide array of products: e.g., "Angel Soft  
22 Hand, Foot and Body Scrub," an Orange County, California dba  
23 (Exhibit 3, Print-out re internet search of term "angel soft,"  
24 Feb. 16, 2008, No. 6)

25 However, a descriptive mark may be entitled to protection if  
26 it has acquired a secondary meaning. There is no showing that  
27 ANGEL SOFT has acquired any following in the California Latino  
28

1 and Spanish Speaking market or that the product has been widely  
2 advertised in Los Angeles or Southern California and is even  
3 known or recognized by purchasers. (Decl. of Armando Jimenez,  
4 pars. 3, 6) The advertisements attached to Plaintiff's supporting  
5 papers are from mainstream glossy English-language journals;  
6 there is no showing that these journals are read by Latinos.

7 Therefore, ANGEL SOFT's marks are not entitled to protection  
8 under even the most generous interpretation of the Lanham Act.

9 **F. PLAINTIFF BELIEVES THAT ITS MARKS FALL INTO ONE OF TWO PRO-**  
10 **TECTED CATEGORIES BUT ITS MARKS ARE NOT ENTITLED TO PROTECTION**  
11 **WITHIN EITHER THE TWO CATEGORIES**

12 1. Plaintiff is unsure of its own trademark

13 Plaintiff claims that the ANGEL SOFT brand was launched in  
14 1944. (Memorandum, p. 3) Yet, Plaintiff is unsure of whether its  
15 marks are arbitrary or suggestive. In fact, in both its original  
16 papers and in its supplemental brief, Plaintiff denies that its  
17 marks are suggestive, then goes on to brief the issue to hedge  
18 its bets. (Memorandum, p. 11: "On the spectrum of distinctive-  
19 ness, the ANGEL SOFT Trademarks are arbitrary--not descriptive or  
20 suggestive of the type of product...") (Supplemental Brief, p. 9:  
21 "The phrase "Angel Soft" is not descriptive or suggestive of the  
22 type of product--bathroom tissue.")

23 As Defendant has noted, the mark is descriptive since it is  
24 merely another way of saying that Plaintiff's bathroom tissue is  
25 "soft as an angel." However, assuming that the mark is sugges-  
26 tive, it is a weak mark that does not merit statutory protection.

27 2. A suggestive mark is one that requires an imagination to  
28 determine the nature of the goods.

One circuit court has described the difference between a descriptive mark and a suggestive one:

"A term is suggestive if it requires imagination, thought and perception to reach a conclusion as to the nature of goods. A term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities or characteristics of the goods." Blinded Veterans Association v. Blinded American Veterans Foundation, 872 F.2d 1035, 1040 (D.C. Cir. 1989)

In the present case, Plaintiff notes (in a footnote) that the word "soft" may be suggestive of bathroom tissue products," but then notes (again in a footnote) that the Trademark Office forced Plaintiff "to disclaim any independent trademark rights in the word "soft" in its trademark application." (Supplemental Brief, p. 9, note 2)

Assuming that the phrase "Angel Soft" is suggestive, rather than descriptive, Plaintiff is not required to demonstrate a secondary meaning to protect its claim. Blinded Veterans Association v. Blinded American Veterans Foundation, *supra*, 872 F.2d at p. 1040 (D.C. Cir. 1989) However, our circuit has found that a suggestive mark may be considered "weak" and not entitled to the greater protection afforded an arbitrary mark. AMF Incorporated v. Sleekcraft Boats, 599 F.2d 341, 350 (9th Cir. 1979)

To gain statutory protection, a suggestive mark must undergo a rigorous analysis, and its owner must demonstrate that there is "a likelihood of confusion" in the public's mind between its own mark and that of an offending one. GoTo.com, Inc. v. Walt Disney Co., *supra*, 202 F.2d at p. 1206.

1 The Angelite mark and ANGEL SOFT marks are so dissimilar that  
2 there is no likelihood of confusion.

3 3. Under the tests set down by our circuit for trademark  
4 infringement, Plaintiff cannot demonstrate that the public is  
5 likely to confuse its marks with the Angelite brand.

6 In a leading case, decided almost thirty years ago, our cir-  
7 cuit stated that a suggestive trademark will merit protection if  
8 the marks in dispute "...are quite similar and the goods closely  
9 related." AMF Incorporated v. Sleekcraft Boats, supra, 599 F.2d  
10 at p. 350. As the court also noted, a "weak mark" may be "pro-  
11 tected only against similar goods, similarly marketed." Id. at p.  
12 350 (citing Westward Coach Manufacturing Co. v. Ford Motor Co.,  
13 388 F.2d 627, 634 (7th Cir. 1968)).

14 In the present case, Angelite markets its tissues to the  
15 Latino and Spanish speaking market in which Plaintiff, despite  
16 some effort, is wholly unknown. (Decl. of Armando Jimenez, par.  
17 4) Further, Defendant marketed its Angelite at swap meets where  
18 Plaintiff has little, or no, presence. (Suppl. Decl. of John Lee,  
19 pars. 5 and 6)

20 With regard to the similarity of disputed marks, a more recent  
21 9th Circuit opinion has provided further guidance. First, "...the  
22 marks must be considered in their entirety and as they appear in  
23 the marketplace." GoTo.com, v. Walt Disney Co. supra, 202 F.3d at  
24 p. 1206. Second, "...similarity is adjudged in terms of appear-  
25 ance, sound, and meaning." Id. at p. 1206.

26 Angelite sells its products in a specialized market aimed  
27 toward Latinos and the Spanish speaking community; moreover, the  
28 marks are different in appearance, sound, and meaning:

1 a. The appearance of the marks is totally dissimilar  
2 In determining the similarity of marks, a court may look to  
3 the font and colors. GoTo.com., Inc. v. Walt Disney Co., supra,  
4 202 F.3d at p. 1206.

5 The ANGEL SOFT font is in large white block lettering. (Memo-  
6 randum, p. 3) Angelite's logo is written in script. Moreover, the  
7 "g" in Angelite has a certain flourish that the bland "g" in  
8 ANGEL SOFT lacks. (Memorandum, p. 7) In addition, the Angelite  
9 logo is wrapped in an oval shape; the ANGEL SOFT lettering is set  
10 against a blue background. The difference in logos is an impor-  
11 tant key in determining the similarity of marks. AMF Incorporated  
12 v. Sleekcraft Boats, supra, 599 F.2d at p. 351.

13 Further, the colors are totally different. The ANGEL SOFT  
14 packaging has a blue and yellow background (similar to that used  
15 by other tissue products as shown in Exhs. 1 and 2). The Angelite  
16 package has a pink background.

17 Using the single glance test set forth in GoTo.com., to com-  
18 pare ANGEL SOFT and Angelite, it cannot be said that "...one is  
19 immediately struck by their similarity." GoTo.com. v. Walt Disney  
20 Co., supra, 202 F.3d at p. 1206. In fact, the marks upon a close  
21 inspection are totally dissimilar from a visual standpoint.

22 b. The sound of the marks is dissimilar.

23 Our circuit has noted that in comparing marks, "Sound is also  
24 important because reputation is often conveyed word-of-mouth."  
25 AMF Incorporated v. Sleekcraft Boats, supra, 599 F.2d at p. 351.

26 Here, both products have the common word "angel" but the  
27 phrase "Angel Soft" has a different sound than the single word  
28



1 "Angelite,"--a neologism. The two marks are not "strikingly alike  
2 when spoken." AMF Incorporated v. Sleekcraft Boats, supra, 599  
3 F.2d at p. 352 (noting the similarity between "Smirnoff and Sarn-  
4 off") (Citation omitted.)

5 c. The meaning of the marks is dissimilar  
6 "closeness in meaning can itself substantiate a claim of  
7 similarity of trademarks." AMF Incorporated v. Sleekcraft Boats,  
8 supra, 599 F.2d at p. 352. However, the word "soft" and "lite"  
9 are not synonyms. Id. at page 352. "Soft" refers to texture, the  
10 feel of a tissue; "lite" or "light" refers to weight. The Random  
11 House Dictionary, Ballantine Books (1980 ed.)

12 Therefore, there is no likelihood of confusion by consumers  
13 based upon the appearance, sound, or meaning of the marks.

14 4. Plaintiff's marks are not arbitrary

15 Plaintiff argues that "On the spectrum of distinctiveness, the  
16 ANGEL SOFT Trademarks are arbitrary." (Supplemental Brief, p. 9)  
17 Plaintiff claims that the mark is arbitrary because the word  
18 "angel" has no relation to bathroom tissue. If Plaintiff marketed  
19 its tissue under the single word "Angel," its argument might have  
20 merit. However, adding the descriptive word "soft" robs the  
21 phrase of its uniqueness when applied to bathroom tissue--and  
22 merely is another way of describing the quality of the product.

23 Plaintiff cannot have it both ways: its mark is not arbitrary  
24 when combined with the adjective "soft." See, Blinded Veterans  
25 Association v. Blinded American Veterans Foundation, supra, 872  
26 F.2d at p. 1040, note 9 (listing examples of arbitrary marks:  
27 "Black & White" scotch whiskey, "Mustang" motels).

28 5. Plaintiff has not demonstrated likelihood of confusion

1 under the other ~~slackcraft~~ factors.

2 The "similarity of the marks" is the single factor that courts  
3 seem to accord the most weight in determining "likelihood of  
4 confusion." See, e.g., GoTo.com, Inc., v. Walt Disney Co.,  
5 supra, 202 F.3d at p. 1205) However, a number of other factors  
6 are also relevant: e.g., 1) strength of the mark, 2) proximity of  
7 the goods, 3) evidence of actual confusion, 4) marketing channels  
8 used; 5) type of goods and the degree of care likely to be exer-  
9 cised by the purchaser as well as a party's intention. AMF  
10 Incorporated v. Sleekcraft Boats, supra, 599 F.2d at p. 348.

11 In the presence case, Defendants have demonstrated that the  
12 ANGEL SOFT marks are descriptive--and that "angel soft" is actu-  
13 ally a common phrase to describe a product. (Exh. 3) Moreover,  
14 Defendant Angelite has used swap meets as marketing channels--and  
15 Plaintiff's glossy magazine ads in national magazines are not  
16 geared to this Southern California market. While both products  
17 are bathroom tissues, Latino purchasers are careful shoppers and  
18 have no attachment or loyalty to Plaintiff's "Angels in Action"  
19 or "Bathroom Moments" advertising campaigns. (Decl. of Armando  
20 Jimenez, par. 4)

21 Defendants strongly object to Plaintiff's statement that  
22 Spanish speaking customers are more likely to be confused. (Decl.  
23 of Armando Jimenez, par. 2) (Memorandum, p. 14 ("...these [i.e.,  
24 Spanish speaking customers] are likely to be confused.") Also,  
25 Defendant Lee had no intention to infringe on ANGEL SOFT's marks  
26 since the logos were completely different, the colors and type  
27 were different, and equally importantly, ANGEL SOFT was not sold  
28

1 in the Latino markets. especially at swap meets where Angelite  
2 was sold. (Suppl. Decl. of John Lee, paragraph 8)

3 Further, the only supposed evidence of "actual confusion," is  
4 an anonymous letter from a consumer that does not even mention  
5 Angelite but refers to a Mr. Allen Chow. (Decl. of Andrew Towle  
6 in Support of Ex Parte Application for TRO, Exh. 28)

7 Therefore, there is no "likelihood of confusion" under the  
8 ~~slackcraft~~ factors.

9 F. PLAINTIFF IS NOT LIKELY TO PREVAIL ON ITS FALSE DESIGNATION OF  
10 ORIGIN CLAIM SINCE THE MARKS ARE TOTALLY DISSIMILAR AND ANGE-  
11 LITE'S PACKAGE STATES THAT THE PRODUCT WAS "MADE IN CHINA."

12 Plaintiff notes that to establish a false designation of  
13 origin claim, it must establish the same elements "as are re-  
14 quired to prove a trademark or trade dress infringement claim."  
15 (Memorandum, p. 17)

16 Defendant has already demonstrated that there is no likelihood  
17 that an ordinary consumer would confuse Angelite's distinctive  
18 mark with those of ANGEL SOFT.

19 Moreover, Angelite's wrapping clearly states that the product  
20 was "Made in China" and therefore there is no confusion about the  
21 point of origin. (Decl. of John Lee, par. 7) (Exh. 4)

22 G. PLAINTIFF IS NOT LIKELY TO PREVAIL ON ITS UNFAIR COMPETITION  
23 CLAIM SINCE IT HAS NOT SHOWN EITHER LIKELIHOOD OF CONFUSION NOR  
24 ACTUAL CONFUSION

25 Plaintiff correctly notes that under a state law unfair compe-  
26 tition claim the test is "whether the public is likely to be  
27 deceived or confused by the similarity of the marks." (Memoran-  
28 dum, p. 18)

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1 Defendant has already demonstrated that there is no likeli-  
2 hood that an ordinary consumer would confuse Angelite's  
3 distinctive mark with those of ANGEL SOFT.

4 Moreover, the one consumer complaint that Plaintiff has  
5 produced is anonymously signed "Anonymous for Consumer protec-  
6 tion" and apparently does not even refer to Defendant's product.  
7 (Declaration of Andrew Towle in Support of Ex Parte Application  
8 for TRO, Exh. 28)

9 The court should ignore this lettre de cachet and deny Plain-  
10 tiff's request for an injunction under state law.

11 H. OUR CIRCUIT HAS RECOGNIZED THAT IN "EXCEEDINGLY RARE" IN-  
12 STANCES A PARTY'S VOLUNTARY CESSATION OF CHALLENGED CONDUCT WILL  
13 MOOT INJUNCTIVE RELIEF. DEFENDANT LEE'S REMOVAL OF 59, 520 TISSUE  
14 WRAPPINGS AND HIS VOLUNTARILY INFORMING DISTRIBUTORS THAT HE WILL  
15 NOT FILL RE-ORDERS DEMONSTRATES THAT THIS IS SUCH AN INSTANCE

16 Our circuit has recognized that in "exceedingly rare" in-  
17 stances a party's voluntary cessation of challenged conduct will  
18 render moot requested relief. Federal Trade Commission v. Afford-  
19 able Media, 179 F.3d 1228, 1238 (9th Cir. 1999)

20 In order to meet this burden, a party "...must show that  
21 "subsequent events [have] made it absolutely clear that the  
22 allegedly wrongful behavior cannot reasonably be expected to  
23 recur." Id. at p. 1238.

24 In the present case, Defendant John Lee voluntarily supervised  
25 the removal of 59, 520 tissue wrappings that bore the Angelite  
26 label and has informed the court under oath that his company is  
27 "...no longer selling, importing, or distributing Angelite tissue  
28

(pending the outcome of this litigation)." (Decl. of John Lee, par. 1; Suppl. Decl., par. 1

Moreover, Defendant Lee has written to his five major distributors informing them that "...we are no longer selling Angelite tissue and will not refill any reorders. Instead, we are offering for sale our Swan label which is not in controversy." (Decl. of John Lee, par. 2)

Plaintiff's concern that Defendants will distribute Angelito tissues is a red herring. Defendants have applied for a trademark under that name--as is their right, and Plaintiff has contested the mark--and has until April to file its opposition papers. However, Defendant has never imported, sold, or distributed any tissues using the Angelito brand and will not do so until this litigation is concluded. (Suppl. Decl. of John Lee, par. 3)

Based upon Defendants' strong actions in removing the offending wrappings and their voluntarily contacting distributors to inform them that the company will not re-fill any Angelite orders, Defendants have made an "absolutely clear" showing that their marketing of Angelite (or Angelito) tissues "cannot reasonably be expected to recur" until this litigation is concluded.

Plaintiff's request for a preliminary injunction should therefore be denied.

Dated: February 26, 2008

KAZANJIAN & MARTINETTI  
RONALD MARTINETTI, ESQ.

By Ronald Martinetti  
Ronald Martinetti  
Attorneys for Defendants  
Lee's General Toys and  
John Lee



**EXHIBIT** 1





**EXHIBIT 2**

13300T

Time of Request: Saturday, February 16, 2008 19:40:50 EST  
Client ID/Project Name: Ron Martinetti  
Number of Lines: 72  
Job Number: 1823:75887135

Research Information

Service: Terms and Connectors Search  
Print Request: All Documents 1-11  
Source: Combined Business and Corporation Information  
Search Terms: "angel soft"

Send to: REBHURN, HARRY  
HARRY REBHURN LAW OFFICES OF  
1441 N VISTA ST APT 2  
LOS ANGELES, CA 90046-4227

EXHIBIT 3

3-1

1. AESTHETIQUE, INC., DOMESTIC CORPORATION (PROFIT), 6/1/1996, 11/13/1996, 100137343, ARKANSAS SECRETARY OF STATE  
... ANGEL SOFT SKIN ...

2. ANGEL-SOFT NATURAL SKIN CARE, OTHER (ASSUMED NAME), 3/9/2004, ANX8174652, MINNESOTA SECRETARY OF STATE

3. ANGEL SOFT, OTHER (ASSUMED BUSINESS NAME), 5/3/1994, 39892088, OREGON SECRETARY OF STATE

4. ANGEL SOFT INK, 11/27/2007, 2007040288, SAN DIEGO COUNTY, CALIFORNIA, FICTITIOUS BUSINESS NAMES

5. ANGEL SOFT CLEANING, INC., DOMESTIC FOR PROFIT, 1/11/2006, P06000005399, FLORIDA DEPARTMENT OF STATE

6. ANGEL SOFT HAND, FOOT AND BODY SCRUB, 11/1/2004, 20046006242, ORANGE COUNTY, CALIFORNIA, FICTITIOUS BUSINESS NAMES

7. ANGEL SOFT RAGDOLLS-UNIDOLLS, 7/1/2000, MICHIGAN FICTITIOUS BUSINESS NAMES

8. Angel-Soft Natural Skin Care, DBA, 3/9/2004, MINNESOTA FICTITIOUS BUSINESS NAMES

9. ANGEL SOFT WATER CO., INC., DOMESTIC CORPORATION, 11/1/1973 (Anniversary Month: NOVEMBER), 50336123, ILLINOIS SECRETARY OF STATE

10. ANGEL SOFT ALPACAS, INC., DOMESTIC CORPORATION, 3/3/1998 (Anniversary Month: MARCH), 59828843, ILLINOIS SECRETARY OF STATE

11. ANGEL SOFT TISSUE MILLS, INC., FOREIGN BUSINESS, 9/27/1995, 7/30/1976, 406278, NEW YORK DEPARTMENT OF STATE

13300T

\*\*\*\*\* Print Completed \*\*\*\*\*

Time of Request Saturday, February 16, 2008 19:40:50 EST

Print Number: 1823:75887135

Number of Lines: 72

Number of Pages: 1

Send To: REBHURN, HARRY  
HARRY REBHURN LAW OFFICES OF  
1441 N VISTA ST APT 2  
LOS ANGELES, CA 90046-4227

3-3



**EXHIBIT 4**

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Attorneys for Defendants  
Lee's General Toys, Inc., and  
John Lee

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE. NO. 07 CV 2391  
(JAH POR)

GEORGIA-PACIFIC CONSUMER  
PRODUCTS LP, a Delaware limited  
partnership,

Plaintiff,

vs.

LEE'S GENERAL TOYS, INC., a California  
corporation, JOHN LEE, an individual; and  
DOES 1-10,

Defendants.

Date: Feb. 28, 2008  
Judge: Hon. J. Houston

DECLARATION OF JOHN LEE IN REBUTTAL TO PLAINTIFF'S REPLY

I, Ron Martinetti, hereby declare:

1. I took the photographs that are labeled as Exhibits 1, 2,  
and 4.

2. The photographs of the Scott and CVS bathroom tissues were  
taken last week in New York City. I purchased both toilet issues  
and photographed the items. Scott of course is a nationally known



brand that has been widely advertised over the years. CVS is a generic label--the manager of the store told me that the chain is especially strong in the South and that he believed that CVS also ran a chain of drugstores in California.

3. I also photographed the Angelite roll with the Made in China stamp. Although this stamp is visible to the naked eye, I used a magnifying glass to improve the quality.

4. Exhibit 3 was printed from the internet by Harry Rebhuhn my former law partner.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this February 27, 2008 at Glendale, California.

*Ren Mark*

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Attorneys for Defendants  
Lee's General Toys, Inc., and  
John Lee

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE. NO. 07 CV 2391  
(JAH POR)

-----  
GEORGIA-PACIFIC CONSUMER  
PRODUCTS LP, a Delaware limited  
partnership,

Plaintiff,

vs.

LEE'S GENERAL TOYS, INC., a California  
corporation, JOHN LEE, an individual; and  
DOES 1-10,

Defendants.

)  
) DECLARATION OF  
) ARMANDO JIMENEZ IN  
) OPPOSITION TO PL.'S  
) MOT. FOR PRELIMINARY  
) INJUNCTION

Date: Feb. 28, 2008  
Judge: Hon. J. Houston

DECLARATION OF JOHN LEE IN REBUTTAL TO PLAINTIFF'S REPLY

I, Armando Jimenez, hereby declare:

1. I have been a private licensed investigator in California since 1988 and have worked in both the criminal and civil fields. I am also fluent in Spanish and have been very active in the Latino community in Southern California. I have worked in voter registration projects for Latinos and grass roots fundraising for

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1 Latino programs in education and domestic violence prevention.

2 2. I am also a father and have a family and am very familiar  
3 with shopping for household goods and products. In addition, I  
4 interact socially with many Latino families and am familiar with  
5 their education and awareness. I strongly disagree with Plain-  
6 tiff's counsel's statement that Latinos may be more easily con-  
7 fused than other shoppers. Latinos are careful and prudent  
8 shoppers, like myself, and there is no way I would confuse the  
9 Angel Soft logo and the Angelite logo. They are completely dif-  
10 ferent to the eye and ear.

11 3. I read Spanish language papers such as La Opinion and  
12 Spanish magazines such as Hispanic Business and Latina (which my  
13 wife subscribes to). I have never seen an ad in these publica-  
14 tions for Angel Soft. Further, I also watch Spanish language  
15 television and have never seen an ad for Angel Soft on Spanish  
16 language TV (including Angel Soft's "Bathroom Moments" campaign).

17 4. In addition, I have traveled extensively in the Los  
18 Angeles and San Diego areas and, as far as I can determine, Angel  
19 Soft has absolutely no following or niche in the Latino market.  
20 As far as I am concerned, Angel Soft has no trademark or loyalty  
21 in the Spanish language community and is wholly unknown in the  
22 bathroom tissue market among Latinos.

23 5. As part of my investigation into determining whether Angel  
24 Soft was well-known in the Southern California Latino community,  
25 I visited several stores in Latino neighborhoods for example,  
26 small corner Mom and Pop stores. I did not see any evidence of  
27 Angel Soft and no one seemed to recognize the label. I did,  
28

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1 however, see Angelite in several small stores. My wife, also, is  
2 a shopper who patronizes stores in the East Los Angeles, Whittier,  
3 Montebello area--areas that have a large Latino population. My  
4 wife told me that she was totally unfamiliar with the Angel Soft  
5 bathroom tissue.

6 I declare under penalty of perjury under the laws of the  
7 United States and the state of California that the foregoing is  
8 true and correct.

9 Executed this February 27, 2008 at Glendale, California

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PROOF OF SERVICE

I am employed in Los Angeles County, California; I am over the age of eighteen years and not a party to the within action. My business address is 520 East Wilson Glendale, California 91206.

On this date I served Defendants' Opposition to Plaintiff Georgia Pacific's Motion for Preliminary Injunction; Decls. of R. Martinetti, A. Jimenez, J. Lee

by personal delivery (to the address below)

x  
by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at Glendale, California, addressed to:

Stephen Swinton, Esq.  
Latham & Watkins  
12636 High Bluff Drive, Suite 400  
San Diego, California 92130-2071  
Tel. 858-523-5400  
FAX 858-523-5450

and via FAX to counsel for Georgia-Pacific Consumer Prod. (x)

(x) BY MAIL I sealed and placed such envelope for collection and mailing to be deposited in the mail on the same day in the ordinary course of business at Glendale, California. I am readily familiar with our law firm's practice of collecting and processing correspondence and documents for mailing. They are deposited with the U.S. Postal Service on the same day as dated, in the ordinary course of business.

(State) I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

(x) (Federal

The papers are also to be filed via e-mail.

I declare under penalty of perjury of the state of California that the foregoing is true and correct.

Executed this February 27, 2008 at Glendale, California 91206

*Ran Martinetti*

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Attorneys for Defendants  
Lee's General Toys, Inc., and  
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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CASE. NO. 07 CV 2391  
(JAH POR)

GEORGIA-PACIFIC CONSUMER  
PRODUCTS LP, a Delaware limited  
partnership,

Plaintiff,

vs.

SUPPLEMENTAL DECL.  
OF JOHN LEE IN OPP  
TO PLAINTIFF'S  
MOT. FOR PRELIMINARY  
INJUNCTION

Date: Feb. 28, 2008  
Judge: Hon. J. Houston

LEE'S GENERAL TOYS, INC., a California )  
corporation, JOHN LEE, an individual; and)  
DOES 1-10, )

Defendants.

DECLARATION OF JOHN LEE IN OPPOSITION TO MOT. FOR PRELIMINARY  
INJUNCTION

I, John Lee, hereby declare:

1. I am a defendant in the present action, along with Lee's  
General Toys, Inc. I am the president of Lee's General Toys and  
am familiar with the day to day operations.



2. As I have stated under oath in the past, Defendants have removed the outer wrappings from 59, 520 tissue rolls and are no longer selling, importing, or distributing Angelite tissue (pending the outcome of this litigation).

3. At present, Lee's General Toys has an application pending before the Trademark Office for Angelito. This application has been opposed by Plaintiff Georgia-Pacific and Plaintiff has been granted an extension (their second) to file opposition papers. However, Defendants have never marketed any product under the Angelito label and we will not market or sell any Angelito tissue or any other products using that name until the conclusion of this litigation.

4. Lee's General Toys has focused on marketing Angelite tissues to the Southern California Latino and Spanish speaking market. In fact, the Latino market has been the sole focus of my marketing strategy and the overwhelming number of Angelite tissues that have been sold have been sold to the Latino market. For example, I sell toys and other products directly from our warehouse that is located in Vernon. The overwhelming number of customers who come to purchase items (including in the past, Angelite tissues) are Latino and Spanish speaking. Moreover, I have never sold Angelite tissues to commercial outlets such as hotels.

5. In the past, Angelite tissues has also been sold through five distributors. I have informed these distributors that we are no longer selling Angelite tissues and will not re-fill orders. Three of these distributors almost exclusively sell to swap meets. They are Jorge Acevas Contreras, TBA Mexican Trade Gro-

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1 cery, and TCI Supply Co. Plaintiff Angel Soft has no presence at  
2 these swap meets and these swap meets are largely patronized by  
3 Latinos and Spanish speaking customers.

4 6. I have never seen any Angel Soft advertisement geared to  
5 the Southern California Latino market and have never seen their  
6 products sold at a swap meet.

7 7. Further, the Angel Soft logo with its background photo of a  
8 baby would not be confused with our oval shaped logo that has  
9 blue lettering with pink background. Based upon my experience in  
10 selling both toys and bathroom tissue, Latinos are careful shop-  
11 pers. Since the wrapping has started on it, "Made in China,"  
12 there can be no confusion as to its point of origin.

13 8. I had absolutely no intention of infringing on Angel Soft's  
14 trademark since my logo was completely different, had different  
15 colors and type, and since Angel Soft was not sold in the Latino  
16 market as far as I was able to tell--and was not sold at the swap  
17 meets around Southern California which I sold to. In addition, I  
18 had a valid California trademark which I obtained in 2003.

19 I declare under penalty of perjury that the foregoing is true  
20 and correct under the laws of the United States and the state of  
21 California.

22 Executed this February 27, 2008 at Vernon, California

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